U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

H2

[redacted]

FILE: [redacted] Office: Newark Date: NOV 27 2000

IN RE: Applicant: [redacted]

APPLICATION: Application for Waiver of Grounds of Inadmissibility under § 212(i) of the Immigration and Nationality Act, 8 U.S.C. 1182(i)

IN BEHALF OF APPLICANT:

[redacted]

Public Copy

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Mary C. Mulrean, Acting Director
Administrative Appeals Office

[redacted]

DISCUSSION: The application was denied by the District Director, Newark, New Jersey, and the matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be rejected.

The applicant is a native and citizen of Costa Rica who was found to be inadmissible to the United States under §§ 212(a)(6)(C)(i) and 212(a)(9)(B)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1182(a)(6)(C)(i), for having committed a fraudulent act.

It is stated that the applicant obtained a fraudulent U.S. passport while he was in the United States as a nonimmigrant student using the birth certificate of [redacted] It is further stated that the applicant applied for admission into the United States in December 1996 using that fraudulent document, that he was found guilty for attempted fraudulent entry into the United States and that he was sentenced to 15 days imprisonment. That evidence is not present in the record for review.

The record reflects that the applicant was present in the United States on December 8, 1996 without a lawful admission or parole. An Order to Show Cause (Notice to Appear) was served on him on December 11, 1996. He was ordered deported by an immigration judge on January 7, 1997 and returned to Costa Rica on an unstipulated date. Therefore, he is inadmissible under § 212(a)(9)(A)(ii) of the Act, 8 U.S.C. 1182(a)(9)(A)(ii)

The applicant married a naturalized U.S. citizen in Costa Rica in February 1997 and he is the beneficiary of an approved petition for alien relative. The applicant seeks a waiver of the permanent bar under § 212(i) of the Act, 8 U.S.C. 1182(i), to rejoin his spouse in the United States.

On appeal, counsel states that the Service did not take into consideration all the evidence presented and that there is serious hardship in this matter. Counsel discusses the emotional hardship of separation and the extreme hardship to the applicant's wife if she had to leave the United States to join her husband. Counsel discusses that fact that the applicant's wife supports her son from a prior marriage who is a high school student and one of her daughters who recently separated from her husband.

The district director denied the application for failure of the applicant to establish that serious or exceptional hardship would be imposed on his wife.

Section 212(a)(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under § 235(b)(1) [1225] or at the end of proceedings under § 240 [1229a] initiated upon the alien's arrival in

[redacted]

> the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible...
>
> (iii) EXCEPTION.-Clause (i)...shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

Section 212(a)(9) of the Act was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and became effective on April 1, 1997. For the purposes of § 212(a)(9)(B) of the Act, time in unlawful presence begins to accrue on April 1, 1997. Because the applicant in the matter has not been present in the United States since her attempted entry on April 2, 1997, she cannot be deemed to be inadmissible under § 212(a)(9)(B)(i) of the Act.

The record reflects that the applicant was ordered deported, and as a result, he requires permission to reapply for admission.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated first when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

The operations instruction also provides that after receipt by a Service office, if grounds of inadmissibility other than those for which the waiver is sought are discovered, the application and all relating documents should be returned to the consular officer for reconsideration. This would also apply if certain grounds of inadmissibility are not applicable.

The present record does not contain evidence that the applicant has remained outside the United States for ten consecutive years since the date of deportation or removal as required by 8 C.F.R. 212.2(a), or that he was granted permission to reapply for admission to the United States.

Therefore, since there is no evidence that the Form I-212 application has been adjudicated first and approved in this instance, the appeal of the district director's decision denying the Form I-601 application will be rejected, and the record remanded so that the district director may adjudicate the Form I-212 application first, or provide evidence for the record that a decision has already been made on the Form I-212.

If the district director approves the Form I-212 application or provides evidence that such application has been approved, she shall certify the record of proceeding to the Associate Commissioner for review and consideration of the appeal regarding the Form I-601 application, supported by all necessary documentation. However, if she denies the Form I-212 application or provides evidence that such application has been denied, she shall certify that decision to the Associate Commissioner for review supported by all necessary documentation, reject the Form I-601 application, and refund the fee.

ORDER: The appeal is rejected. The district director's decision is withdrawn. The matter is remanded for further action consistent with the foregoing discussion.